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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BEN AARON ARONOWITZ, et al., Plaintiffs and Respondents, v. PAUL GOLDSTONE TRUST, Defendant and Appellant.	H033725 (Santa Cruz County Super. Ct. No. 159975)

This is an appeal from an order denying the defendant's motion to compel arbitration or, alternatively, judicial reference. We shall affirm.

BACKGROUND

This action involves 113 plaintiffs and a single named defendant. Plaintiffs Ben Aaron Aronowitz et al. are current and former residents of Alimur Park, a mobilehome park located in Soquel, California. Defendant Paul Goldstone Trust owns and operates the park. Plaintiffs allege substandard living conditions at the park.

Pleadings

In April 2008, plaintiffs filed a complaint against defendant, which asserted 10 causes of action.[1] The complaint alleged that each plaintiff was or had been a homeowner or resident of the park within the preceding four years, "under a written agreement based on an instrument in writing which constitutes a rental and lease agreement with defendants." Attached to the complaint was a "representative copy" of the written agreement.

In May 2008, plaintiffs filed and served a first amended complaint. In October 2008, plaintiffs filed and served a second amended complaint. Like the first two iterations of the complaint, the second amended complaint alleged that plaintiffs had entered written lease agreements with defendant, with a representative copy attached.

Arbitration Demand; Exchange of Leases

In August 2008, defendant demanded arbitration, "pursuant to Paragraph 15 of the lease exemplar" attached to the plaintiffs' first amended complaint. (See Code Civ. Proc., § 1280 et seq.)[2]

Following the demand for arbitration, the parties participated "in a mutual exchange of all written leases in their possession in order to determine the specific language binding each plaintiff with respect to arbitration and/or judicial reference." Written leases were located for "all but two plaintiffs." The leases were executed between August 1983 and June 2008. Most "contain a provision obligating the parties to arbitrate their disputes."

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[1] Plaintiffs asserted claims for (1) nuisance, (2) breach of contract, (3) negligence, (4) intentional interference with property rights, (5) breach of the covenant of good faith and fair dealing, (6) negligence per se, (7) unfair business practices, (8) breach of the warranty of habitability, (9) breach of the covenant of quiet enjoyment, and (10) declaratory and injunctive relief.

[2] Unspecified statutory references are to the Code of Civil Procedure.

Five "versions of the lease agreements" were used by the parties, designated "A" through "E." As reflected in defense counsel's declaration, the A leases contain "both an arbitration provision and a provision requiring judicial reference if the arbitration clause [is] not enforced for any reason." The B leases likewise contain both arbitration and judicial reference clauses. The C leases have an arbitration clause but no judicial reference provision. The D leases likewise have only an arbitration clause. Versions A, B, C, and D all employ different phraseology in the arbitration provisions. "Version E does not contain either an arbitration or a judicial reference provision."

By defendant's count, 98 of the 113 plaintiffs "are governed by written leases requiring arbitration of the plaintiffs' claims. Of those 98 plaintiffs, 64 are also governed by a provision alternatively requiring judicial reference of their disputes (plaintiffs with Version A and B leases)." Plaintiffs disagree with defendant's first assertion; they maintain that only 90 of the 113 plaintiffs are subject to arbitration clauses.

Motion to Compel Arbitration or Reference; Opposition; Reply

Defendant moved for an order staying the court action and compelling arbitration or, alternatively, ordering a judicial reference.[3] Defendant supported the motion with points and authorities and with the declaration of its attorney.

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[3] The motion to compel arbitration was made under section 1281.2. The statutory basis for the alternative motion for judicial reference is section 638.

Section 1281.2 provides: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

"(a) The right to compel arbitration has been waived by the petitioner; or

"(b) Grounds exist for the revocation of the agreement.

"(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the

Defendant's motion was "made on the grounds that the overwhelming majority of Plaintiffs have entered into written lease agreements that provide for the arbitration of disputes regarding claimed deficiencies at Alimur Park, including claims and issues subject to this lawsuit by Plaintiffs' Second Amended Complaint. In addition, the majority of written lease agreements between the parties also require that any controversy between them be heard by a referee . . . if any provision of the arbitration agreement is

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petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

"If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

"If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

Section 638 provides in relevant part: "A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

"(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

"(b) To ascertain a fact necessary to enable the court to determine an action or proceeding."

determined to be unenforceable. Defendant requested that Plaintiffs proceed to arbitration of these disputes, but Plaintiffs refused to arbitrate."

Plaintiffs opposed the motion. They submitted points and authorities, their counsel's declaration, and 55 plaintiffs' declarations.

Plaintiffs asked the court to deny the motion on several grounds. Plaintiffs first argued that the lack of a "valid contract to arbitrate between 23 Plaintiffs and Defendant" creates a risk of conflicting rulings. Plaintiffs also argued that the "arbitration and judicial reference provisions are procedurally and substantively unconscionable," and that the provisions "are void as a matter of public policy" under cited statutory provisions.[4]

Defendant replied to the points raised in plaintiffs' opposition. Defendant disputed plaintiffs' "unsubstantiated conclusion that staying the pending action and ordering arbitration would be unfair and create the possibility of inconsistent judgments with respect to non-signatory Plaintiffs." Moreover, defendant maintained, while "section 1281.2 provides a court with discretion to enforce *arbitration* agreements" involving third parties, it "does not refer or apply to judicial reference provisions." Addressing plaintiffs' other points, defendant argued that unconscionability had not been established and that the provisions cited by plaintiffs in support of their public policy arguments do not prohibit arbitration in mobilehome lease agreements.

Hearing and Decision

In November 2008, the court conducted a hearing on defendant's motion. At the conclusion of the hearing, the court denied the motion in its entirety.

Concerning defendant's request to compel arbitration, the court found "that there's a potential for inconsistent rulings given that not less than 13 and as many as 23 of these Plaintiffs are not subject to the arbitration provision, and the various leases at issue have

[4] Regarding their public policy arguments, plaintiffs relied on Civil Code section 798.19, which is part of the Mobilehome Residency Law, and on Civil Code section 1953, subdivision (a), which governs landlord-tenant relationships.

different provisions concerning what is arbitrable and what is not." Exercising its discretion under section 1281.2, subdivision (c), the court denied "the motion to stay the action and to compel arbitration."

Turning to the "portion of the motion seeking judicial reference, appointment of a referee," the court found that "the lease provisions which contain those clauses and the arbitration clauses, constitute adhesion contracts," and it further determined that there was "a showing of both procedural and substantive unconscionability" sufficient to render the provisions "unenforceable."

The court expressly declined to reach the question of whether the provisions were void as against public policy.

On November 24, 2008, the court filed a written order reflecting its ruling from the bench.[5]

Appeal

Defendant brought this timely appeal.

In its opening brief, defendant first addresses the denial of its motion to compel arbitration, arguing (1) the presence of a "minimal" number of plaintiffs without arbitration agreements does not create a risk of conflicting rulings, and (2) the arbitration clauses are not unconscionable. Defendant next challenges the denial of its alternative motion compelling a judicial reference.

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[5] In pertinent part, the written order states:

"1. The motion to compel arbitration is denied pursuant to Civil Procedure Code section 1281.2(c) because the Court finds there would be a danger of conflicting rulings on common issues of law and fact among the different parties.

"2. The motion to compel arbitration, or alternatively for judicial reference, is denied because the arbitration clauses, including those calling alternatively for judicial reference, are contracts of adhesion that are both procedurally and substantively unconscionable.

"3. The court finds it unnecessary to reach plaintiffs' further arguments that the arbitration clauses are void as against public policy under Civil Code sections 798.19 and 1953(a)(4)."

In response, plaintiffs defend the trial court's refusal to compel arbitration, asserting (1) the court did not abuse its discretion, given the potential for inconsistent rulings, and (2) the order can be affirmed on the ground that the arbitration clauses are unconscionable. Concerning denial of the alternative motion for judicial reference, plaintiffs argue (1) the order is not appealable, and (2) the trial court properly determined that the judicial reference provisions are unconscionable contracts of adhesion. Finally, plaintiffs maintain, this court can affirm the order on the alternative ground that the arbitration and judicial reference provisions are void as against public policy.

In its reply brief, defendant disputes all of plaintiffs' arguments.

DISCUSSION

We consider the separate components of the trial court's written order in turn. First, with respect to the denial of defendant's motion to compel arbitration, we affirm the trial court's determination that there is a risk of inconsistent rulings. Next, concerning the denial of defendant's alternative motion to compel a judicial reference, we agree with plaintiffs that it is not appealable. Given those determinations, we need not and do not consider whether the subject provisions are either unconscionable or void.

I. Order Denying Arbitration

As we now explain, the trial court did not abuse its discretion in denying arbitration based on the possibility of inconsistent rulings.

A. Legal Principles

Under the authority of section 1281.2, subdivision (c), "the court, may, in its discretion, refuse to compel arbitration or may stay arbitration where 'there is a possibility of conflicting rulings on a common issue of law or fact.' " (*Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 100 (*Henry*); accord, *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475; see also,

e.g., *C. V. Starr & Co. v. Boston Reinsurance Corp.* (1987) 190 Cal.App.3d 1637, 1640-1641 (*C. V. Starr*); *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 782-783.) Thus contractual arbitration "may have to yield if there is an issue of law or fact common to the arbitration and a pending action or proceeding with a third party and there is a possibility of conflicting rulings thereon." (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 348 (*Mercury*).) "The statute is unambiguous: it allows the trial court to deny a motion to compel arbitration whenever 'a party' to the arbitration agreement is also 'a party' to litigation with a third party that (1) arises out of the same transaction or series of related transactions, and (2) presents a possibility of conflicting rulings on a common issue of law or fact." (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 486 (*Whaley*).)

The trial court denied defendant's motion to compel arbitration pursuant to this provision. We review that decision for an abuse of discretion. (*Mercury*, *supra*, 19 Cal.4th at p. 349; *Best Interiors, Inc. v. Millie and Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1329 (*Best Interiors*); cf. *Whaley, supra,* 121 Cal.App.4th at p. 484 [de novo review of statutory construction issue]; *California Correctional Peace Officers Ass'n v. State* (2006) 142 Cal.App.4th 198, 204 [de novo review of arbitration agreement where no extrinsic evidence is presented].) Under the deferential review standard that governs here, "the trial court's order will not be disturbed on appeal unless it exceeds the bounds of reason." (*Henry*, *supra*, 233 Cal.App.3d at p. 101; *Mercury*, at p. 349.)

B. Application

In this case, as plaintiffs aptly observe, all of their "claims arise from a common legal and factual core: [defendant's asserted] failure to maintain the Park." Yet a number of plaintiffs – somewhere between 15 and 23 – are not subject to contractual arbitration. Furthermore, even as to those plaintiffs bound by arbitration clauses, there are four different versions, each employing somewhat different phraseology.

Defendant nevertheless disputes the potential for conflicting rulings, arguing that each plaintiff's outcome will depend solely on the ability to prove his or her individual case. As defendant puts it: "If one [plaintiff] meets his or her burden of proof in his or her action, and another . . . does not, that is not inconsistent or conflicting." Defendant carries that same theme to the element of damages, arguing that each plaintiff "is making his or her own claims regarding damages from [defendant's] supposed failure to maintain the Park, and each [plaintiff's] case will succeed or fail on its own merits."

We reject defendant's argument. As the trial court explained at the hearing, it is not simply a matter of "whether certain Plaintiffs fail to meet their burden of proof." To the contrary, the trial court stated, "there are a variety of evidentiary issues that could result in inconsistent rulings." Furthermore, as plaintiffs observe: "The fact that individual damages may vary does not negate the fact that liability issues are shared in common." Additionally, as with other multi-forum disputes, the possibility exists that a judge and an arbitrator could make conflicting credibility assessments leading to inconsistent factual determinations. Moreover, the possibility of inconsistent legal determinations exists, since "contractual arbitration generally frees the arbitrator from making a decision strictly in accordance with the law [citations]." (*Mercury, supra,* 19 Cal.4th at p. 345.)

Given the common issues of fact and law presented here, coupled with the variances in the arbitration clauses and the fact that not all plaintiffs are subject to contractual arbitration, there is an ample basis for the court's exercise of discretion under section 1281.2, subdivision (c). "The very nature of the controversy here fully supports the trial court's decision to deny the request for arbitration." (*C. V. Starr, supra,* 190 Cal.App.3d at p. 1641.)

Relevant case law supports affirmance on this basis.

In the *Mercury* case, the plaintiffs sued the defendants for injuries sustained in an automobile accident. (*Mercury*, *supra*, 19 Cal.4th at p. 338.) The plaintiffs also

instituted contractual arbitration with their insurer, Mercury, for damages caused by an "unidentified, and effectively uninsured, motorist." (*Ibid*.) Thereafter, the plaintiffs sought and obtained an order to consolidate "the contractual arbitration proceeding with Mercury as to the uninsured motorist coverage issues with the pending action against [the defendants] – in effect, to join Mercury as a defendant as to these questions – 'for all purposes,' including trial, in order to avoid conflicting rulings on a common issue of law or fact." (*Ibid*.) On review, the California Supreme Court agreed that there was a possibility of conflicting rulings. (*Id.* at p. 350.) As the high court explained, "in the contractual arbitration proceeding, the arbitrator might conclude that the [plaintiffs] were not legally entitled to damages in any amount from the unidentified, and effectively uninsured, motorist, and therefore could not obtain anything from Mercury. In the pending action, however, the superior court might conclude that the [plaintiffs] were indeed legally entitled to damages in some amount from the unidentified, and effectively uninsured, motorist, and therefore could obtain such sum from Mercury." (*Ibid.*)

In the *Henry* case, the court concluded that the challenged "stay of arbitration was properly based on the possibility of conflicting rulings on common issues of law or fact." (*Henry, supra,* 233 Cal.App.3d at p. 98.) As the court explained, in order to prevail on his cause of action for fraud, the plaintiff would have to establish (1) that the individual defendants defrauded him, (2) that the individual defendants were acting as agents of the corporate defendant, and (3) that the corporate defendant was liable for the individual defendants' fraud. (*Id*. at p. 101.) The court concluded: "A possibility of conflict exists as to the first issue because the arbitrator could find [that the] individual defendants did not defraud Mr. Henry while at trial the trier of fact could find there was fraud committed by [them]. The existence of this possibility of conflicting rulings on a common issue of fact is sufficient grounds for a stay under section 1281.2." (*Ibid.*)

The court in *Best Interiors* also affirmed on the same ground. (*Best Interiors, supra,* 161 Cal.App.4th at pp. 1329-1330.) There, the plaintiff subcontractor (Best) sued

the general contractor, the owner, and two inspectors. (*Id.* at p. 1323.) Best asserted that the general contractor's "failure to manage, coordinate, and schedule the work properly interfered with, hindered, and delayed Best's work on the project." (*Ibid.*) It further "alleged that improper and unnecessary inspections by the building inspectors . . . disrupted and hindered its work." (*Ibid.*) The general contractor petitioned to compel arbitration, which the plaintiff opposed on the grounds that the inspectors "could not be compelled to arbitrate; that arbitration would subject Best to a risk of inconsistent results; and that the court had authority under Code of Civil Procedure section 1281.2 to refuse to enforce the arbitration clause." (*Ibid.*) Affirming the order denying arbitration, the court stated: "Separating the claims subject to arbitration from those that cannot be arbitrated could lead to inconsistent results. An arbitrator might find the inspectors acted as agents, thereby exposing [the owner] to liability. The inspectors' interests would not be represented adequately in an arbitration to which they are not parties. The court also would have to decide the issue of agency, and might find that there was none, but [the owner] still would be bound by the inconsistent arbitration decision. Whether the inspectors were at fault would have to be determined in both forums." (*Id.* at pp. 1329-1330.) Under these circumstances, the court concluded, the trial court did not "exceed[] the bounds of reason" in denying the petition to compel arbitration under section 1281.2, subdivision (c). (*Id.* at p. 1330.)

C.V. Starr is yet another case in which the denial of arbitration was affirmed based on the potential for inconsistent rulings. (*C. V. Starr, supra*, 190 Cal.App.3d at p. 1643.) That case involved a dispute among 11 reinsurers concerning allocation of a large judgment against an insured. (*Id.* at p. 1641.) Only one reinsurer was "presently subject to arbitration." (*Ibid.*) "Thus, the remaining allocation disputes [would] presumably be determined by court action." (*Ibid.*) Affirming the order denying arbitration, the court stated: "The potential for conflicting rulings is readily apparent." (*Ibid.*) The appellant argued "that the trial court could have obviated the possibility of conflicting rulings by

staying the court action until arbitration was completed and then taken the . . . arbitration award into account when deciding allocation among the others." (*Id*. at p. 1642.) The court rejected that argument, saying "the potential result of the suggested procedure would be to give the arbitrators' decision binding effect on all the other reinsurers as well, even though, of course, they are not legally bound to arbitrate." (*Id.* at p. 1642.) The court concluded that the "optimal procedure in the present case" would be "a single proceeding bringing together all the affected parties for an orderly decision on the allocations of each reinsurer." (*Ibid.*) "Section 1281.2, subdivision (c) expressly authorizes the trial court to proceed in that manner." (*Ibid*.) Therefore, "the trial court acted well within the bounds of its discretion in denying arbitration pursuant to section 1281.2, subdivision (c)." (*Id.* at p. 1643.)

As these cases recognize, the trial has discretion to deny arbitration where conflicting rulings may result, under the authority of section 1281.2, subdivision (c). Defendant nevertheless argues for application of that provision only in "situations in which a court must apportion or assign liability among parties, some of whom are, and some of whom are not, subject to arbitration agreements." We disagree with that argument. As the *Whaley* court said in response to a similar contention: "The Legislature could easily have chosen to specify that the trial court's authority to deny arbitration pursuant to section 1281.2, subdivision (c) could be exercised only" in those situations. (*Whaley, supra*, 121 Cal.App.4th at p. 486.) "However, it did not do so. 'We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citation.] More specifically, we may not 'insert qualifying provisions not included in the statute.' " (*Ibid.*)

To sum up, the statute gives the trial court discretion to deny arbitration whenever "there is a possibility of conflicting rulings on a common issue of law or fact." (§ 1281.2,

subd. (c).) Because that possibility exists here, the trial court did not abuse its discretion in denying defendant's motion to compel arbitration.

II. Order Denying Judicial Reference

As we now explain, the trial court's denial of defendant's alternative motion for judicial reference is not appealable.

A. Legal Principles

"A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment." (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 696.) "The appealability of the judgment or order is jurisdictional and an attempt to appeal from a nonappealable judgment or order will ordinarily be dismissed." (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297 (*Marsh*).)

"There are three categories of appealable judgments or orders: (1) final judgments as determined by case law, (2) orders and interlocutory judgments made expressly appealable by statute, and (3) certain judgments and orders that, although they do not dispose of all issues in the case are considered 'final' for appeal purposes and are exceptions to the one-final-judgment rule." (*Conservatorship of Rich* (1996) 46 Cal.App.4th 1233, 1235.)

"One exception to the 'one final judgment' rule codified in Code of Civil Procedure section 904.1 is the so-called collateral order doctrine." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561; accord, *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 76.) As the weight of authority describes that doctrine, "an interim order is appealable if: [¶] 1. The order is collateral to the subject matter of the litigation, [¶] 2. The order is final as to the collateral matter, and [¶] 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant." (*Marsh, supra,* 43 Cal.App.4th at pp. 297-298, citing *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116,

119.) There is "a division of opinion and split of authority on the necessity of complying with the third element" of the test. (*Marsh*, at p. 298; see *Muller v. Fresno Community Hosp. & Medical Center* (2009) 172 Cal.App.4th 887, 900-901.) The majority view requires all three elements. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶¶ 2:77-2:80, pp. 2-45 to 2-48.)

B. Application

1. The order is not immediately appealable under the statute

"A trial court's order is appealable when it is made so by statute." (*Griset v. Fair Political Practices Com'n, supra,* 25 Cal.4th at p. 696.) Here, however, no statute makes the judicial reference order appealable.

a. Section 1294

There is express statutory authority for appeals from the denial of a request for arbitration. That authority is contained in section 1294, subdivision (a), which provides: "An aggrieved party may appeal from: [¶] (a) An order dismissing or denying a petition to compel arbitration."

Under this provision, the denial of a motion or "petition to compel contractual arbitration is appealable." (*Mercury*, *supra*, 19 Cal.4th at p. 349; see also, e.g., *Valentine Capital Asset Management, Inc. v. Agahi* (2009) 174 Cal.App.4th 606, 612, fn. 5; *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 768 (*Westra*).) Conversely, "no immediate, direct appeal lies from an order compelling arbitration." (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 648.)

Nothing in section 1294 provides direct statutory authorization for review of the judicial reference order, and defendant does not argue otherwise.

b. Section 1294.2

The Legislature has also provided for ancillary appellate jurisdiction over orders affecting appealable arbitration orders. As stated in the relevant portion of section 1294.2: "Upon an appeal from any order or judgment under this title [governing

arbitration], the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party."

Thus, for example, as case law recognizes, an "order denying a stay is not appealable but may be reviewed on appeal from the order refusing to compel arbitration." (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 6, fn. 1; cf. *Henry, supra,* 233 Cal.App.3d at p. 99 [for purposes of appealability, "an order staying arbitration is the functional equivalent of an order refusing to compel arbitration"].)

"But the ancillary jurisdiction conferred by section 1294.2 simply ensures that the appellate court can effectuate its ruling on an arbitration order, by permitting review of any other trial court decision affecting that specific order." (*Westra, supra,* 129 Cal.App.4th at p. 769.) That limitation on the appellate court's ancillary jurisdiction is reflected in the cases. In *Westra*, for example, the trial court denied arbitration as to the non-signatory realtor while compelling the buyers and seller in the business transaction to arbitrate. (*Id.* at pp. 761-762.) On appeal, the appellate court reviewed the order *denying* arbitration, as statutorily authorized, but it refused to consider the order *compelling* arbitration. (*Id.* at p. 769.) Rejecting the argument that the non-appealable order compelling arbitration "was 'intertwined' with" the appealable order denying arbitration, the court found the two orders "logically separate and not intermediate to each other." (*Id.* at pp. 768-769.) Similarly, in the *Merrick* case, discussed in *Werstra*, "the appellate court held it had no jurisdiction to review a ruling sustaining a demurrer in connection with an appeal from an order denying a petition to compel arbitration. The court found that the demurrer only concerned the merits of the underlying action and, as in the present case, did not affect the order denying the petition to compel arbitration which has been appealed from." (*Id.* at p. 769, discussing *Merrick v. Writers Guild of America, West, Inc.* (1982) 130 Cal.App.3d 212, 220.)

Here, the judicial reference order does not fall within the ancillary appellate jurisdiction provided by section 1294.2. Review of that order is not necessary to "effectuate" our ruling on the arbitration order. (*Westra, supra,* 129 Cal.App.4th at p. 769.) To the contrary, judicial reference is wholly separate from contractual arbitration. (Cf. *Mercury, supra*, 19 Cal.4th at pp. 342-345 [distinguishing contractual arbitration law from judicial arbitration law].) The two portions of the order challenged here thus are "logically separate and not intermediate to each other." (*Westra*, at p. 769.) There is no ancillary appellate jurisdiction over the denial of defendant's judicial reference motion.

2. The order is not immediately appealable under the collateral order rule

As explained above, under the majority view, to be immediately appealable, an order must (1) be "collateral to the subject matter of the litigation," (2) be "final as to the collateral matter," and (3) direct the appellant to pay money or perform an affirmative act. (*Marsh, supra*, 43 Cal.App.4th at pp. 297-298.)

Here, the first two elements are satisfied, but the third is not. (Compare, *Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 970, 976 ["order that the plaintiffs pay the arbitration filing fee is collateral and directs the payment of money" and thus "is appealable"].) The challenged order does not direct defendant to pay money nor does it require defendant to act. "On the contrary, the order below *prevents* the performance of an act, namely," submission to judicial reference. (*Conservatorship of Rich, supra*, 46 Cal.App.4th at p. 1235 [denial of motion to substitute counsel was not appealable].)

In our view, the payment/performance element is required. We thus agree with the majority view "that judicially compelled payment of money or performance of an act remains an essential prerequisite to the appealability of a final order regarding a collateral matter." (*Conservatorship of Rich, supra*, 46 Cal.App.4th at p. 1237; compare *Muller v. Fresno Community Hosp. & Medical Center, supra*, 172 Cal.App.4th at pp. 900-902.)

Our conclusion is based on longstanding California Supreme Court precedent, *Sjoberg v. Hastorf, supra,* 33 Cal.2d 116. In the clear words of that case: "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him." (*Id*. at p. 119.)

In our view, *Sjoberg* remains good law; it was not implicitly overruled by *Meehan v. Hopps* (1955) 45 Cal.2d 213. "It is true that the *Meehan* case, which postdates *Sjoberg*, contains language appearing to find an attorney disqualification order appealable as a final order on a collateral matter without considering whether it meets the payment-of-money/performance-of-an-act requirement." (*Conservatorship of Rich, supra,* 46 Cal.App.4th at p. 1237, citing *Meehan v. Hopps,* at pp. 216-217.) However, as other courts have observed, "a close reading of the pertinent passage in *Meehan* warrants the conclusion that that the high court was concerned only with the issue of finality and did not intend to overrule its own holding in *Sjoberg* that" the payment or performance element is an "indispensable requirement to the collateral order exception. History has borne out the wisdom of this analysis," given later California Supreme Court decisions reflecting that requirement. (*Conservatorship of Rich,* at p. 1237; compare, *Muller v. Fresno Community Hosp. & Medical Center, supra,* 172 Cal.App.4th at pp. 901-902.) To that analysis, we would add that *Meehan* involved denial of "the defendants' motion to enjoin plaintiffs' counsel from further participation in the case and to restrain such counsel from disclosing certain confidential information pertaining thereto." (*Meehan v. Hopps*, at p. 214.) In the court's words, "Hopps correctly contends that the motion for a restraining order falls within section 963 of the Code of Civil Procedure which provides that an appeal may be taken '. . . 2. From an order . . . refusing to grant or dissolve an injunction.' " (*Id.* at p. 215, quoting former § 963; see now § 904.1, subd. (a)(6).) The challenged order in *Meehan* thus was made appealable by statute. (*Ibid.*)

Applying *Sjoberg* to this case, we necessarily conclude that the judicial reference denial is not appealable under the collateral order doctrine, since it does not direct either the payment of money or the performance of an act. (*Sjoberg v. Hastorf*, *supra*, 33 Cal.2d at p. 119.) We thus have no jurisdiction to review that order in this interim appeal. "If appellants have a right to [a reference] they may assert it on the appeal from the final judgment in the contract action." (*Ibid.*; cf. *Abramson v. Juniper Networks, Inc.*, *supra,* 115 Cal.App.4th at p. 648 [court may review order compelling arbitration on appeal from final judgment].)

DISPOSITION

The order denying defendant's motion to compel arbitration is affirmed.

_____
McAdams, J.

WE CONCUR:

_____
Mihara, Acting P.J.

_____
Duffy, J.